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THE EVOLUTION OF THE ENGLISH JOINT STOCK LIMITED TRADING COMPANY.

England has for many centuries been a trading community, which has recognized the advantages of a number of persons working together for the furtherance of a commercial adventure or undertaking. For many years Englishmen have been called a "Nation of Shopkeepers," but they were all that and more long before the epithet was applied.

An American has done more than any Britisher to tell us the story of the Gild Merchant and the craft gilds. He says that the

"words 'so that no one who is not of the Gild may trade in the said town except with the consent of the burgesses,' which frequently accompanied the grant of a Gild Merchant, expressed the essence of this institution. It was clearly a concession of the exclusive right of trading within the borough. The Gild was the department of town administration whose duty it was to maintain and regulate the trade monopoly. This was the *raison d'être* of the Gild Merchant of the twelfth and thirteenth centuries; but the privilege was often construed to imply broader functions—the general regulation of trade and industry."[1]

As to the craft gilds he says:

"During and anterior to the fourteenth century it is probable that a charter of the King was necessary for the founding of a fraternity, but in the succeeding centuries we meet with numerous examples of the establishment and incorporation of craft gilds or trading companies by the town authorities. * * * During the sixteenth and seventeenth centuries the Crown sometimes granted to a town the power to create or divide itself into fraternities or mysteries."[2]

[1] Gross, Gild Merchant, Vol. I, p. 43. [2] Ib. p. 113.

These early trading or trade-regulated bodies had, probably, no joint stock or capital, whether transferable or not by the members. Moreover, they were institutions mostly, if not entirely, for trading at home and not abroad. This was not enough for a people with a sprinkling of Viking blood in their veins.

If we are shopkeepers, we are also a sea-faring community, and towards the close of the sixteenth century some of our navigators might have been well described as "circumnavigating trading pirates." The early history of the East India Company is an apt illustration, and its promoters, like those of other companies, availed themselves of what was then, practically, the only way of sound commercial trading in foreign parts under the English flag—namely, that of a corporation established by Royal Charter. Queen Elizabeth and the three or four English sovereigns who succeeded her were quite liberal to themselves in their ideas as to what could be given by a Royal Charter, and what could be so given was not clearly defined, at all events in Elizabeth's time. But some points were quite clear.

I.—Trading Corporations under Prerogative Royal Charters.

The Crown had at common law, and still has, the power of incorporating by charter any number of persons assenting to be incorporated. Early English traders took advantage of this power, having no Companies Acts to register under, and being indisposed to spend money in obtaining Acts of Parliament. The merchants, or adventurers, or pirates were quite willing to accept the conditions of a Royal Charter, and its consequences. They got their corporate name, "the Knot" of their constitution. The corporation's founders were its god-fathers, but the sovereign baptized it. It could sue and be sued by its corporate name, and under and in that name it had perpetual succession, with the power to hold property, a common seal, and the power to make by-laws and so on. Later, it was held that it was not in the power of the Crown to give the corporators any right in the way of monopolies, or "so to incorporate those persons as to make them liable to any extent to the debts of the corporation." [3]

It is stated also that the sovereign could not grant a charter of incorporation for a limited time, but several sovereigns had different opinions on this point. In 1825 the Act 6 Geo. IV, c. 91 (the Act which repealed the Bubble Act) provided that in any charter

[3] Per Lindley, L. J., in Elve *v.* Boyton (1891) 1 Ch. 501.

thereafter to be granted by the sovereign "for the incorporation of any company or body of persons" it should be "lawful in and by such charter to declare and provide that the members of such corporation" should be individually liable, in their persons and property, for the debts, contracts and engagements of such corporation, to such extent, and subject to such regulations and restrictions as "the sovereign might deem fit and proper, and as" should "be declared and limited in and by such charter," and that the members should thereby be rendered so liable.

This provision was repealed in 1837 by sec. 2 of the Act 7 Will. IV and 1 Vict., c. 73, and sec. 29 of the same Act enabled the Crown in any charter of incorporation to be thereafter granted to limit the duration thereof for any period whatsoever,

"and also in any charter of incorporation (whether in perpetuity or for any term or period) either by reference to this Act, or otherwise, to make the corporation thus formed, and the officers and members thereof, subject to all of the provisions, liabilities and directions hereinbefore authorized to be imposed on or required from any unincorporated company or body, or its officers or members, and also to confer on such corporation or its members or officers all the powers or privileges hereinbefore authorized to be conferred on any unincorporated company or body, or its officers or members."

These powers and provisions are indicated under another heading.

By 47 and 48 Vict., c. 56 (1884), sec. 29 of the Act of 1837 is to be "construed as from the date thereof to have authorized and to authorize Her Late Majesty by charter or by warrant or other writing under her sign-manual" to extend or renew any charter granted by Her Late Majesty or any privileges thereunder. Persons who wished to trade together were quite willing to be incorporated by Royal Charter although it had been laid down by lawyers that the corporation thereby created had "no soul"; that it was only *in abstracto,* and rested only in "intendment and consideration of law," and were perhaps consoled by the confident averment that their corporation was "invisible and immortal," and was not "subject to the imbecilities of the mind."

Charters obtained from the Crown by false and fraudulent statements might and may be annulled by *scire facias;* or they may be surrendered, the corporation ceasing to exist when the surrender has been accepted, and has been enrolled in the proper office.[4]

[4] Lindley on Companies, 138.

Reference has already been made to the views which sovereigns took as to their right to grant monopolies. One instance of how they carried that view into practice is that of the old East India Company. The first Royal Charter of that company was granted in 1600.

"Until 1610 it had been a common practice of the Crown, by charter or letters patent, to grant to subjects an exclusive right to sell, buy, make, work or use anything within the realm (Bac. Abr., tit. Monopoly). But * * * such monopolies were held void by the Courts (*Case of Monopolies* (1601) 11 Co. Rep. 84b)."[5]

The East India Company's charter is said to have

"contained nothing which remarkably distinguished it from the other charters of incorporation so commonly in that age bestowed upon trading associations. It constituted the adventurers a body politic and corporate by the name of the 'Governor and Company of Merchants of London, trading to the East Indies.'"

Subject to certain vested interests it granted to the company the *exclusive privilege of trading to the East Indies.* The charter was

"granted for a period of fifteen years, but under condition that, if not found to be advantageous to the country, it might be annulled at any time under a notice of two years; if advantageous, it might, if desired by the company, be renewed for fifteen years."[6]

The Charter therefore apparently infringed both the rule as to monopolies and the rule against creating a corporation for a limited time.

Yet in 1609 the East India Company obtained a renewal of its charter conferring all its preceding privileges and constituting it a body corporate forever, subject to a provision that on experience of injury to the nation its exclusive privileges should, after three years' notice, cease and expire.[7] This was only fourteen years before the Statute of Monopolies, passed in 1623, which, while declaring that while all monopolies "are altogether contrary to the laws of this realm and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution," by sec. 9 exempted from the operation of the Act charters granted to "any companies, or societies of merchants within this realm created for the maintenance, enlargement or ordering of any trade or merchandise."

[5] Encyclopædia of English Law.

[6] Mill's History of British India (4th ed.) Vol. I, p. 24.

[7] Ib., p. 28.

The East India Company was originally what was called a "regulated company," not a joint stock company.

"The very last day of the 16th century having given birth and form to the first East India Company, the members thereof immediately raised the sum of £72,000, though not in one joint-stock or common capital, as in succeeding times, there having been no joint-stock in this company till about 1612 or 1613." [8]

The company was managed by a chairman and a committee of directorate of twenty-five. Though the list of subscribers had been readily filled up,

"the calls of the committee for the payment of installments were very imperfectly obeyed. Even when the charter was obtained, it was either understood to confer no power of compelling payment, or the directors were afraid to make use of it. Instead of exacting the stipulated sums, and trading upon the terms of a joint-stock company, the subscribers who had paid were invited to take upon themselves the expense of the voyage, and, as they sustained the whole risk, to reap the whole of the profit." [9]

Up to about 1613 each adventure was

"the property of a certain number of individuals, who contributed to it as they pleased, and managed it for their account, subject only to the general regulations of the company." [10]

The joint-stock subscriptions of the East India Company will be referred to later on.

The company had some dealings with Cromwell in relation to joint-stock, which will be noticed later on, and on April 3d, 1661, Charles II granted a new charter to the company, confirming its ancient privileges and giving it authority to make peace and war with non-Christians; his father had given it martial law over its servants.

In 1684, in the case of the *Honorable East India Company* v. *Sandys*,[11] the grant to the company of the exclusive right of trading with India was contested but upheld. The principal ground for this decision was that the sole privilege of trading was in foreign parts. Jefferies, C. J., in the course of his judgment, says:

"I conceive this charter of sole trade to the Indies, excluding others, is neither opposed by the common law or prohibited by an Act of Parliament: but is supported by both, as will more evidently appear by the practice and constant usage in all times.

[8] Anderson's History of Commerce, Vol. I, p. 451.

[9] Mill's History of British India (4th ed.) Vol. I, pp. 24, 25.

[10] Ib., p. 30. [11] 10 State Trials 373.

* * * And it is not denied that if the King should proclaim a war with the Indians, that then it would be a prohibition to all his subjects to have any commerce with them. * * * So that surely this charter, with these restrictions, is much better than total exclusion; and therefore foreign trade is not like our home trade, to which the word monopolies is properly applicable; for that cannot be totally excluded for any time, though never so small, by any act of prerogative."

The long report of this case and other authorities show that the Crown had granted several other charters giving exclusive license to trade in particular foreign countries. "The public in general," says Mr. Mill,[12] "at last disputed the power of a Royal Charter *unsupported by Parliamentary sanction,* to limit the rights of one part of the people in favor of another, and to debar all but the East India Company from the commerce of India."

In 1690 a committee of the House of Commons resolved that a new company should be established by Act of Parliament, but that the present company should trade exclusively until the new company was established, and in 1691 the House itself asked the King to dissolve the company and incorporate a new one. William III referred the matter to his Privy Council, and in 1693 gave the old company a new Royal Charter continuing its exclusive privileges for twenty-one years.[13] Some of the later history of the East India Company may be referred to under subsequent heads.

II.—Trading Companies Under Royal Charters Granted in Pursuance of Special Statutory Authority.

The prerogative charter of William III to the East India Company did not settle matters even for twenty-one years. The House of Commons voted "that it was the right of all Englishmen to trade to the East Indies, or any part of the world, unless prohibited by Act of Parliament." A rival association of traders to India, or new company, then sprang up, and after some encroachments on the old company's sphere of action a very curious Act of Parliament was obtained in 1698.[14] It is entitled "An Act for raising a sum not exceeding Two Millions upon a Fund for Payment of Annuities after the Rate of Eight Pounds per Centum per Annum, and for Settling the Trade to the East Indies,"

[12] History of British India (4th ed.) Vol. I, p. 129.

[13] Ib., p. 132. [14] The Act 9 and 10 Will. III, c. 44.

and is an early instance of Parliamentary recognition of the advantages of joint-stock trading. Many of the sections relate to the raising of duties on salt, and exported fish, but sec. 48 authorized the King to appoint Commissioners under the Great Seal to take subscriptions for £2,000,000 from persons and "bodies politick or corporate." Sec. 53 enabled sums to be subscribed at a discount for prompt payment. Sec. 56 made it "lawful for His Majesty, by Letters Patent under the Great Seal of England, to incorporate all and every" the above-named subscribers "to be one body politick and corporate by the name of 'The General Society entitled to the Advantages given by an Act of Parliament for advancing a sum not exceeding Two Millions, for the service of the Crown of England,'" and by that name to have perpetual succession and a common seal. Later sections provided that if the money was duly subscribed the subscribers should have exclusive rights of trading to the East Indies, and that such of them as should be willing to join together their shares and interests should be "incorporated so as they may be able to manage their trade (in proportion to their interests) as a company and by a *joint stock*." But provision was made that the old company should have leave to trade to India until 1701.

In pursuance of this Act William III, on September 3, 1698, granted a charter to some of the subscribers of the £2,000,000 on the terms of a "regulated company." Most of the subscribers, however, desired to trade on a joint-stock, and obtained a charter about the same time forming them into a joint-stock company by the name of "The English Company trading to the East Indies." This was what was called the "New East India Company" or "The English Company," the old company being called "The London Company." How the two companies became subsequently one company will be shortly referred to.

Another company created by Royal Charter in pursuance of authority under a special statute was the Bank of England. In 1694 the Act 5 Will. and Mary, c. 20, was passed. Its title is "An Act for Granting to Their Majesties several Rates and Duties upon Tonnage of Ships and Vessels, and upon Beer, Ale, and other Liquors, for securing certain Recompenses and Advantages in the said Act mentioned to such Persons as shall voluntarily advance the sum of Fifteen hundred thousand Pounds towards the carrying on the War against France." The earlier sections

granted the duties and provided the machinery for collecting them. Sec. 19 authorized Their Majesties to appoint Commissioners under the Great Seal to receive voluntary subscriptions towards raising £1,200,000 (part of the £1,500,000 referred to in the title), and an annual sum of £100,000 was annually appropriated to the subscribers. Sec. 20 empowered Their Majesties by letters patent under the Great Seal to incorporate "all and every such subscribers and contributors, their heirs, successors or assigns, to be one body politick and corporate by the name of 'The Governor and Company of the Bank of England,' to have perpetual succession and a common seal" with power to hold lands, etc.—another Parliamentary recognition of joint-stock advantages. Sec. 21 provided that, at any time on twelve months' notice after August 1, 1705, on re-payment of the £1,200,000, the yearly payment to the subscribers of the £100,000 was to cease, "and the said corporation shall absolutely cease and determine." But the Bank has survived to the present day.

The subscriptions for the £1,200,000 were completed in ten days' time, and the Royal Charter in pursuance of the Act was executed on July 27, 1694.[15]

Many statutes relating to the Bank of England have since been passed, and the Bank Act, 1892,[16] sec. 7, enabled Her Late Majesty to grant to the Bank a supplemental charter regulating the internal affairs of the corporation.

Another company created by Royal Charter, in pursuance of a special statute, was the South Sea Company. In 1711, the debts of the navy and other public debts being very large, Harley formed the scheme of raising a fund to pay 6 per cent. interest on them by making certain duties permanent, and by granting a monopoly to the proprietors of this funded debt, and incorporating them for the purpose of such trade.[17]

The Act in the 9 Anne, c. 21, was passed in consequence, and in the early part of it there is a good deal about sovereigns "most gracious," and "of glorious memory," and of "most dutiful and faithful subject," and of the "Blessing of Almighty God." (Promoters have always been adepts in fine language.) Then after making permanent or imposing certain duties, sec. 23 and other sections referred to the "principal or capital stock" of the intended

[15] See Anderson's History of Commerce, Vol. II, p. 206.

[16] 35 and 36 Vict., c. 48. [17] Collyer on Partnership (2nd ed.) 722.

company, and sec. 25 enabled the Queen by letters patent under the Great Seal to incorporate the proprietors of the funded debt as "one body politick or corporate in deed and in name, and by such name as Her Majesty, her heirs or successors shall think fit, and by that name to have perpetual succession and a common seal." Sec. 29 made provision that persons interested in bills or debentures payable out of the navy and other public offices should be admitted into the "joint-stock" of the said company and be and become members thereof, and several subsequent sections also referred to the same "joint-stock." Sec. 36 provided that the charter might direct how and in what manner and proportions the shares in the stock of the intended company should be assignable or transferable. Sec. 46, after reciting that trading to the South Sea and other parts of America within certain limits "cannot so securely and successfully be begun and carried on as by a *Corporation with a Joint-Stock* exclusive of all others," provided that the intended company should have the sole right of trading within certain defined limits. The company was incorporated in pursuance of the Act by a Royal Charter.

In March of this year, 1711, Addison, writing in the *Spectator,* places, as the second of "our society," and next to Sir Roger de Coverly, "Sir Andrew Freeport, a merchant of great eminence in the City of London." He will "tell you," says Mr. Spectator; "that it is a stupid and barbarous way to extend dominions by arms; for true power is to be got by arts and industry." And in the *Spectator* of May 19, 1711, Addison writes: "There is no place in the town which I so much love to frequent as the Royal Exchange. It gives me a secret satisfaction, and in some measure gratifies my vanity, as I am an Englishman, to see so rich an assembly of countrymen and foreigners consulting together upon the private business of mankind, and making this metropolis a kind of emporium for the whole world. * * * Trade, without enlarging the British territories, has given us a kind of additional empire."

Nothing so far about bubbles!

Still another company created by Royal Charter in pursuance of a special act was the London Assurance. A public general statute passed in 1719,[18] empowered the King to grant two several charters incorporating two separate bodies for the insurance of

[18] 6 Geo. I, c. 18.

ships at sea. Under this Act Royal Charters were granted to the London Assurance in 1720, and to another company in 1721. In *Elve* v. *Boyton*,[19] Lindley, L. J., with reference to these charters, or one of them, says:

"Now consider for a moment what the Crown could do, and what it could not do at that time. The Crown could by its prerogative incorporate any number of persons who assented to be incorporated. * * * But it was not in the power of the Crown to give those persons any rights in the way of monopolies. What does this Act of Parliament of the 6 Geo. I do? It empowers the Crown to grant charters of a particular kind—to grant charters which the Crown could not grant apart from the provisions of this Act * * *. It gives them a monopoly in matters of assurance and bottomry which the corporations could not have had without the Act."

III.—Companies Incorporated by Special Acts of Parliament.

Lord Lindley says:

"If a charter could not be obtained from the Crown, a company which desired to be legally recognized as such was compelled to apply to Parliament for a special Act of its own. The Act usually sought was either an Act incorporating the company, or an Act which, without incorporating it, authorized it to sue and be sued by its secretary or some other officer * * *. [Some] incorporating Acts rendered the members of the company liable for its debts to the extent of their respective shares of a nominal capital of the company, or of so much thereof as might not have been paid up." [20]

So that many of them must have had a joint stock.

In the absence of any provision in an act of incorporation, the law as to the liability of the members for debts was the same as in the case of a Royal Charter.

"A corporation is a legal *persona* just as much as an individual; and, if a man trusts a corporation, he trusts that legal *persona,* and must look to its assets for payment; he can only call upon individual members to contribute in case the Act or Charter has so provided." [21]

It was business-like to pass an Act which obviated the necessity of inserting in these special acts minute provisions as to constitution and management, and in 1845 there was passed the Com-

[19] (1891) 1 Ch. 501, 507. [20] Lindley on Companies (6th ed.) 4.

[21] Per Cave, J., in In re Sheffield and South Yorkshire etc. Society (1889) 22 Q. B. D. 470, 476.

panies Clauses Consolidation Act, comprising "in one general Act sundry provisions relating to the constitution and management of joint-stock companies usually introduced into Acts of Parliament authorizing the execution of *undertakings of a public nature* by such Companies." By sec. 1 the Act is to apply to every joint-stock company by any future act incorporated for the purpose of carrying on any such undertaking, and is to be incorporated with it, and "all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the company which shall be incorporated by such Act." The Act gives a kind of limited liability. By sec. 36, if any execution is issued against the effects of the company and there cannot be found sufficient whereon to levy it, then execution may be ordered to be issued against any of the shareholders "to the extent of their shares respectively in the capital of the company *not then paid up.*" By sec. 37, if under such execution any shareholder pays any sum beyond the amount then due from him in respect of calls, he is forthwith to be reimbursed by the directors out of the funds of the company. The liability, though limited, is enforced by the creditor, not by the company, which is not the modern method.

This Act, as amended, applies to companies incorporated for such purposes as constructing a railway.

IV.—Unregistered Joint-Stock Companies.

Up to 1612 or 1613 the voyages of the East India Traders had, as has been pointed out, been conducted on the terms rather of a "regulated" company than a joint-stock company. This was

"less favorable to the power and consequence of a governor and directors than trading on a joint-stock, which threw into their hands the entire management and power of the whole concern. Accordingly they * * * in 1612 were enabled [22] to come to a resolution that in future the trade should be carried on by a joint-stock only. It still appears to have been out of their power to establish a general fund, fixed in amount and divided into shares, * * * but [members] now * * * subscribed, not each for a particular adventure, * * * but all into the hands of the Governor and Directors who were to employ the aggregate as one fund or capital for the benefit of those by whom it was advanced." [23]

[22] It is not said how.

[23] Mill's History of British India (4th ed.) Vol. I, p. 31.

A joint-stock of £429,000 was accordingly raised. The company's "Second Joint Stock Subscription" was opened in 1617-18 and produced £1,600,000.[24] In 1631-32 the company's "Third Joint Stock" was obtained, and amounted to £420,700.[25] New subscriptions were obtained in 1638, 1642-43 and 1647-48, by and before which time the rights of the holders of the various stocks seem to have become considerably mixed.

These joint-stocks are referred to as being early instances of attempts to trade on joint-stock without, apparently, any authority of Parliament or Royal Charter. Royal Charters at this time were, indeed, somewhat at a discount, and after the company and a rival association, countenanced by Charles I, had come to somesort of a union, overtures were made to Parliament, which passed a resolution directing the trading to be carried on by a joint-stock.[26] This resulted in a "United Joint Stock." Internal dissensions soon took place and in 1654 the United Joint-Stock Holders were petitioning for a change of constitution and asking that "The East India Company should no longer proceed exclusively on the principle of a joint-stock trade."[27] Matters were referred to the Council of State, and by it to the Protector and his Council,[28] and while the directors were willing to get round Cromwell by a loan, the proprietors of the United Stock ("the Merchant Adventurers") obtained from him a commission to fit out some ships for the India trade under the management of a committee.[29] The Council of State ultimately decided in favor of exclusive trade with joint stock, and the company and the Merchant Adventurers then (possibly after another charter) opened a new subscription.[30]

How the New or English Company was afterwards formed as a joint-stock company under Royal Charter has already been pointed out in Division II. The Old or London Company there referred to made the best of the remaining three years. As a corporation it was able to subscribe and did largely subscribe towards the £2,000,000. The shares in the New or English Company fell to a discount, and after some rivalry between the two companies, and proposals for the union of them, there was a "tripartite" amalgamation deed (dated July 22, 1702) to which Queen Anne herself and the two companies were parties, and which was passed under the Great Seal, whereby it was agreed that

[24] Id., p. 38. [25] Ib., p. 65. [26] Ib., p. 78. [27] Ib., p. 82.
[28] Id., p. 86. [29] Ib., p. 87. [30] Ib., p. 89.

the London Company should purchase from the English Company so much of the capital stock of the latter as would make the property of the former equal to the property which would then remain to the other members of the English Company, and that all trading for a certain time should be for the benefit of the stockholders of the English Company (including the new members) in proportion to their shares, during which time the London Company was to have an equal voice in the management of the trade, and that afterwards the whole trade should be carried on by the English Company under the Charter of 1698. It is stated that there was provision for the two companies taking the common name of "The United Company of Merchants trading to the East Indies," but the Act next mentioned shows that in law there remained two separate companies under their former names, and their differences were ultimately settled by an agreement to refer to the Earl of Godolphin, the Act 6 Anne, c. 17, and the award of Godolphin made thereunder in 1708.

In the very year of, and just before the passing of the Bubble Act (1719) the Act 6 Geo. I, c. 4 was passed "for enabling the South Sea Company to increase their present capital stock and fund by redeeming such public debts and incumbrances as are therein mentioned." This and previous Acts, some of which have already been referred to, show that the principle of joint-stock trading was not too bad to be approved and adopted time after time by the Legislature, and its example was followed by large partnerships professing to trade on a joint-stock, in shares purporting to be transferable without the assent of all the members.

Even before 1719 "we read of bubbles sufficiently important to attract the notice of the Legislature." [31] The speculative transactions and operations of the South Sea Adventurers are matter of elementary history. But, says Collyer,

"the thirst for speculation was not confined to them. The whole nation had become adventurers, and every day produced new commercial companies, some for useful, others for the most chimerical purposes; some founded on obsolete charters and others, the most numerous, not affecting the least authority of that nature." [32]

Pope, writing to Dean Swift on June 20, 1716, says: "So churches sink as generally as banks in Europe, and for the same reason—that Religion and Trade, which at first were open and

[31] Collyer on Partnership (2nd ed.) 724. [32] Ib., 725.

free, have been reduced into the Management of Companies, and the Roguery of Directors." Some of the Bubbles were, then, burst by 1716, which was shortly before the Bubble Act was passed. At that time the "subscriptions" for joint stock were very various and numerous. Anderson says:

"Some of the obscure keepers of these books of subscriptions, contenting themselves with what they had got in the forenoon by the subscription of one or two millions * * * were not to be found in the afternoon of the same day, the room they had hired for a day being shut up, and they and their subscription books never heard of more. On others of these projects *2s.* and *2s. 6d.* per cent. was paid down; and on some few *10s.* per cent. was deposited, being such as had some one or more persons of known credit to midwife them into the alley. * * * Some were divided into *shares,* instead of hundreds and thousands, upon each of which so much was paid down, and both for them and the other kinds there were printed receipts signed by persons utterly unknown." [33]

One project was advertised to be "For subscribing Two Millions to a certain promising or profitable design, which will hereafter be promulgated." A burlesque of this kind of thing was an advertisement that "At a certain (sham) place on Tuesday next, Books will be opened for a subscription of Two Millions, for the Invention of Melting down Saw Dust and Chips, and casting them into Dealboards, without Cracks or Knots." [34]

The author just cited exhibits what he calls "a more complete catalogue than any we have seen of the Stocks, Subscriptions, Projects, or Bubbles of this unparalleled Time, with their highest prices in 'Change Alley' before the fatal *scire facias* had (like the touch of Ithuriel's Spear) reduced them all to their proper size and value." His list is duly classified under such heads as "Great Corporations," "Deserted Companies," "Local and Particular Projects," "Projects or Bubbles having neither Charter nor Act of Parliament to authorize them," while one project, in a class of its own is "For building of Hospitals for Bastard Children."

Lord Ellenborough, in speaking of this situation said:

"Subscriptions had about that period been opened to an enormous extent (to as much, it is said, as 300 millions) upon the wildest schemes imaginable; the shares in such adventures were transfer-

[33] History of Commerce, Vol. II, p. 291. [34] Ibid.

able; they were as common an article of sale at market as the stock in the public funds, and had been sold at immense premiums."[35]

"The fatal *scire facias*" to which Andrews refers, was the writ which was obtained to repeal the letters patent obtained by some of the Bubbles.[36] These writs, which are said to have been issued at the instigation of the South Sea Company, were not issued until after the Bubble Act had passed.

The Bubble Act[37] was passed in 1719, and its title was "An Act for better securing certain Powers and Privileges intended to be granted by His Majesty by two Charters for Assurances of Ships and Merchandises at Sea, and for lending Money upon Bottomry; and for *restraining several extravagant and unwarrantable Practices therein mentioned.*" The Act shows, by the recitals in sec. 18, the associations at which it was aimed, for after referring to those who opened "books for public subscriptions, and to draw in many unwary persons to subscribe therein towards raising large sums of money" for "dangerous and mischievous undertakings or projects related to several fisheries and other affairs," there is a recital "that in many cases the said undertakers and subscribers" had (1) "presumed to act as if they were corporate bodies," (2) had "pretended to make their shares in stocks transferable without any legal authority by Act of Parliament or Charter," (3) had acted or pretended to act under some charter granted for special purposes therein expressed, but had used such charters for raising joint-stocks and making transfers for their own "private lucre," which were never intended by the charter, and (4) had acted under some obsolete charter which had become void or voidable. The Act then declared to be illegal and void undertakings and attempts "tending to the common grievance, prejudice and inconvenience of the King's subjects or great numbers of them," and public subscriptions etc. for furthering, countenancing or proceeding in any such undertaking or attempt, and more particularly the acts numbered (1) to (4) above.

Sec. 19 provided that such unlawful undertakings, subscriptions, making or accepting transfers of shares, etc., and more particularly the things numbered as above, "shall be deemed public nuisances" and tried as such, and punishable by forfeiture, im-

[35] Rex *v.* Webb (1811) 14 East 416.

[36] See the cases of the Welsh Copper Company referred to in Browne *v.* Gibbins (1725) 5 Bro. P. C. 491, 492, and the Lustning Company referred to in Stent *v.* Bailis (1724) 2 P. Wm. 217. [37] 6 Geo. I, c. 18.

prisonment, etc. But by Secs. 22 to 27 the Act was not to apply to (1) any undertakings or other matters or things settled, established, or practiced before June 22, 1718, which were to have the same validity as before the Act; or (2) the two corporations to be established under the first part of the Act; or (3) the South Sea Company; or (4) the carrying on of any home or foreign trade in partnership in such manner as had been usual and might be legally done (except marine insurance and bottomry); or (5) any corporation formerly created for carrying on a trade which they had continued to carry on from the time of their establishment; or (6) subscriptions for enlarging the capital stock of the South Sea Company, or (7) the East India Company.

Collyer says:

"It may be fairly conjectured that the Bubble Act itself was passed at the instigation of the South Sea Company; and was, therefore, a mere machine for propping up the credit of that company; consequently, that it was made with no real view to the interest of trade in general, and is not to be considered, so far as the intentions of the framers were concerned, as declaratory of the common law in regard to mercantile companies."

Lord Lindley says that the attempt to put down joint-stock companies by the Bubble Act was futile, and that, notwithstanding it, joint-stock companies increased both in number and importance.[38]

The Bubble Act was repealed in 1835 by the Act 6 Geo. IV, c. 91, but some decisions on it may be referred to. About two years after it had been passed a man was punished on an information under the Act for setting up a Bubble called the North Sea.[39] From this time for about eighty-seven years, says Collyer, "the statute appears to have been forgotten; but" in 1808 "a criminal information was moved for against the framer and proprietor of a trading scheme, on the ground that it was expressly against the provisions and policy of the statute."[40] The head-note of the report of the case is quaint. It says that the writing of subscriptions to a transferable joint-stock

"by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective

[38] Lindley on Companies, p. 3.

[39] Rex *v.* Cawood (1724) 2 Ld. Raymond 1361.

[40] Rex *v.* Dodd (1808) 9 East 516; Collyer on Partnership (2nd ed.) 728.

shares, seem to be an offence within the act. But as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to this application, the Court refused to interfere by granting an information, though they discharged the rule without costs."

The British Ale Company was a public company, neither incorporated by charter nor Act of Parliament, and its shares were transferable; and Lord Mansfield held that it was within the Act, although there was no evidence that beer tended to the common grievance, prejudice or inconvenience of His Majesty's subjects.[41] The Philanthropic Annuity Society, an unincorporated company, with transferable shares, was held by Lord Ellenborough to be within the Act and illegal.[42] In *Rex* v. *Webb* [43] Ellenborough, C. J., doubted

"whether the mere raising of transferable stock is in any case, *per se,* an offense against the Act, unless it has some relation to some undertaking or project which has a tendency to the common grievance, prejudice or inconvenience of His Majesty's subjects or great numbers of them."

But this is contrary to what was laid down in 1825 in *Josephs* v. *Pebrer*[44] that

"if the projectors * * * before the association has been sanctioned either by an Act of the Legislature or by Royal Charter, make shares in the concern transferable without any restriction, at the mere will of the holder, and provide that the purchasers shall render themselves liable to regulations to be passed by persons styling themselves a committee of management or directors, then the association assumes an unlawful shape."

When there were restrictions on the transfer of shares—*e. g.,* requiring the approval of the committee, or that transferees should be members of the company—it was held that the company was not necessarily illegal.[45]

Lord Lindley says that the Bubble Act "probably gave rise to much more mischief than it prevented," but that "the repeal of the Act still leaves room for the contention that companies of the

[41] Buck *v.* Buck (1808) 1 Camp. 547.

[42] Rex *v.* Stratton (1809) 1 Camp. 549, note.

[43] (1811) 14 East 416. [44] (1825) 3 B. & C. 639, 641.

[45] Rex *v.* Webb (1811) 14 East 416, Pratt *v.* Hutchinson (1812) 15 East 511, Ellison *v.* Bignold (1821) 2 J. & W. 510—cases which may be useful in interpreting a section of the Companies Act, 1907.

nature described in the Act are illegal at common law." And it must be remembered that the repealing Act contains a recital, said to have been introduced by Lord Eldon, that it is expedient

"that the said several undertakings, attempts, practices, acts, matters and things aforesaid should be adjudged and dealt with in like manner as the same might have been adjudged and dealt with according to the common law, notwithstanding the said Act."

In *Kinder* v. *Taylor* [46] Lord Eldon said that

"though attention was due to what was the construction of the 6 Geo. I, it ought never to be forgotten that there was a common law as well as a statute. * * * He would repeat that, in the argument (if it ever took place) upon this Act of Parliament, it should never be forgotten that there was a common law, and if the Act was to be construed to destroy the common law remedy, the question then would be, whether such a construction was not at variance with every sound and legal principle of justice."

But Collyer, who produces this case, says himself that the enactment as to "acting as a corporation * * * was" perhaps

"directed against persons who pretended to be in possession of some charter of incorporation, and not against every species of society. But however this may be, it seems to be unquestionable that there are particular offences of this kind for which an indictment will lie, *not only under the statute but even at common law.* It is apprehended, however, that the more general charge of acting as a corporation would not * * * support an indictment at common law, but that there must be additional averments, stating with particularity the nature of the offence,"

and that the opinion of Lord Eldon "must be received with this limitation."

In *Duvergier* v. *Fellows* [47] Best, C. J., says (and after the Bubble Act had been repealed):

"There can be no transferable shares of any stock except the stock of corporations, or of joint-stock companies created by Act of Parliament * * *. The pretending to be possessed of transferable stock is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations. * * * The acting as such a corporation without charter * * * is contrary to law." [48]

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[46] See Collyer on Partnership (2nd ed.) 917.

[47] (1828) 5 Bing. 248, 267.

[48] The actual decision was approved in (1830) 10 B. & C. 826, and in the House of Lords in (1832) 1 Cl. & Fin. 39, although the particular point is not referred to by the Lords.

In *Blundell* v. *Winsor*[49] the Anglo-American Gold Mining Association, an unincorporated joint-stock company formed in 1833, the shares of which might be increased to an unlimited extent and were assignable at the discretion of the holder, was held, by Shadwell, V. C., to be illegal and fraudulent. But, as Lord Lindley points out,[50] in the two last cases there were "additional circumstances rendering it unnecessary to decide on this ground alone" —namely, that joint-stock freely transferable by an unincorporated company made that company illegal.

The Potosi la Paz and Peruvian Mining Association, formed in 1824, but not incorporated, had a capital of a million in shares of £50 each, which were only transferable with the approval of the directors to the transferee, who was required to execute an instrument binding him to observe the association's regulations. There was a clause intimating that each subscriber was liable only to the extent of his share. Lord Brougham said that to hold such a company illegal would be to say that every joint-stock company not incorporated by charter or Act of Parliament was illegal and indictable as a nuisance, and to decide this for the first time.[51] There, again, the power of transfer was restricted.

The Limerick Marble & Stone Company was an unincorporated society founded in 1839 with a joint-stock of £50,000 divided into shares of £100 each, which were apparently transferable, and the Court of Common Pleas held that it was not an illegal company.[52] Tindal, C. J., says:

"The raising and transferring of stock in a company cannot be held, in itself, an offence at common law; such species of property was altogether unknown to the law in ancient times; nor indeed was it in usage and practice until a short period antecedent to the passing of the Bubble Act as is evident from the preamble to the eighteenth section."

And he distinguishes *Duvergier* v. *Fellows*.[53]

The same Anglo-American Gold Mining Association, which was declared to be illegal in *Blundell* v. *Winsor*,[54] was held by the Court of Common Pleas to be legal.[55] From the judgment at page 139 it seems that the only restriction on transfer was "that

[49] (1837) 8 Sim. 601. [50] Lindley on Companies, pp. 132, 133.
[51] Walford *v.* Ingilby (1832) 1 M. & K. 61, 76.
[52] Garrard *v.* Hardy (1843) 5 M. & G. 471.
[53] (1828) 5 Bing. 248, 267. [54] (1837) 8 Sim. 601.
[55] Harrison *v.* Heathorn (1843) 6 M. & G. 81.

the transferee shall have no right to act or receive any benefit until his title shall be approved of by the solicitor of the company—a matter of regulation more properly than of restraint."

Lord Lindley [56] came to the conclusion that

"an unincorporated company with transferable shares will not be held illegal at common law, unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of His Majesty's subjects."

V.—Quasi Corporations.

In 1826, by the Act 7 Geo. IV, c. 46, not only bodies politic or corporate created for the purpose of banking (namely banking corporations), but also any number of persons united in covenants or copartnership, although more than six in number, were authorized to carry on the business of bankers in like manner as copartnerships of bankers consisting of more than six in number might lawfully do, and also to issue notes outside the radius of sixty-five miles from London; but members of such a corporation or partnership were liable for the concern's debts and notes. Before any such corporation or copartnership consisting of six persons could issue bills or notes or borrow, owe or take up any money on its bills or notes it had to make a return at the Stamp Office in London of certain particulars *including the names and places of abode of two or more members who had been appointed public officers, in the name of any one of whom the corporation or copartnership could sue or be sued.* Judgment against the public officer operated against the copartnership and also against its members, although execution could only be issued against the latter under certain conditions. Banks under this Act, which were in operation before May 6th, 1844, were not compelled to come under the system instituted by the Act 7 and 8 Vict., c. 113.

In 1834 an Act [57] was passed enabling the Sovereign by letters patent under the Great Seal to grant to any company or body of persons associated together for any *trading,* charitable, literary or other purposes, and their heirs, executors, administrators and assigns, although not incorporated by such letters patent, any privileges which according to common law, or the Act 6 Geo. IV, c. 91,[58] it would be competent to the Crown to grant by a charter of incorporation, especially the privilege of maintaining

[56] Lindley on Companies, p. 183.
[57] 4 and 5 Will. IV, c. 94.
[58] See Division I.

and defending legal proceedings in the name of one or more of the principal officers of the association. The letters patent and the names of such officers had to be entered in books open to public inspection. Judgment in any such proceedings had the like effect on the property of the association and persons and property of every member as if they had been parties and the judgment had been personal against them. Leave had to be obtained to enforce the judgment by execution, and execution against a person could not be obtained when he had for three years ceased to be a member.

This Act was repealed in 1837 by the Act 7 Will. IV and 1 Vict., c. 73, which now bears the short title of the Chartered Companies Act, 1837.[59] This statute also repealed the 4 and 5 Will. IV, c. 94, and enabled the sovereign by letters patent under the Great Seal "to grant to any company or body of persons associated for any trading or other purposes whatsoever, and to the heirs, executors, administrators and assigns of any such persons, *although not incorporated* by such letters patent, any privileges which, according to the rules of the common law it would be competent to the" sovereign "to grant to such company or body of persons in and by any charter of incorporation." In particular the letters patent might enable the association to sue or be sued in the name of one of the two officers who were to be nominated and registered for that purpose; and might effectually provide that the members of the association should be individually liable in their persons and property for the debts, contract engagements and liabilities of the association "to such extent only per share as shall be declared and limited in and by such letters patent," such liability to be enforced as thereinafter provided. A deed or an agreement of partnership had to be entered into appointing the officer to sue or be sued, and stating the number of shares into which the undertaking was divided, and other particulars.

The Act contains elaborate provisions as to transfer, returns, etc.

Judgment against the registered officer was to have the same effect against the property of the association, and also (to the extent thereinafter mentioned) against the persons and effects of the individual existing or former members thereof, respectively, as if obtained against the association in proceedings to which all

[59] See 55 and 56 Vict., c. 10.

the persons liable as existing or former members had been parties, and execution might be issued thereon accordingly; but when the liability per share was limited by the letters patent, execution was not to be issued against an individual member for a greater sum than the residue, if any, of the amount for which by virtue of the letters patent he was liable in respect of his shares after deducting the amount, if any, paid upon the share "by virtue of any former execution" and not repaid to him by the company at the time of issuing the subsequent execution.

"As regards liability to creditors, companies formed under these Acts were essentially *partnerships*"—not corporations—"their members were liable to their last farthing for the debts of the companies; but before recourse for payment of such debts could be had against an individual member it was necessary for the creditors to show that they could not obtain payment from the company." [60]

VI.—Trading Corporations under Letters Patent Granted in Pursuance of a General Statute.

On the 5th of September, 1844, there was passed a statute of forty-nine sections [61] called "An Act to regulate Joint Stock Banks in England." It provided that it should not in future be lawful for any company of more than six persons to carry on the trade of bankers in England under any agreement or covenant of co-partnership entered into after May 6th, 1844, unless by virtue of letters patent granted by the Queen "according to the provisions of the Act," but such companies established before May 6th were allowed to go on as before.

New banking companies of more than six persons had to petition the Queen in Council for a grant of letters patent. The petition had to be signed by at least seven of the company, and had to state practically the particulars now stated in the memorandum of association of a company limited by shares. If the Board of Trade reported compliance with the Act the Queen was empowered with the advice of the Privy Council to grant the letters patent. But a deed of partnership (in a form approved by the Council) had to be executed by the holders of at least half the shares, on each of which one-tenth had to be paid up, and the provisions of the deed, with such others as to Her Majesty should seem fit, were

[60] Lindley on Companies, p. 5. [61] 7 and 8 Vict., c. 113.

to be set forth in the letters patent. The letters patent granted that the persons executing the deed and all other persons who should become shareholders in the business, their executors, administrators, successors and assigns, respectively, should be "one body politic and corporate, with perpetual succession and a common seal and power to hold lands of such annual value as should be expressed in the letters patent." But the letters patent were to be for a term not exceeding twenty years, and might be made subject to such other provisions and stipulations as to Her Majesty might seem fit, and, notwithstanding such incorporation, the liability of the shareholder was unlimited. Even after the letters patent had been obtained the company could not commence business until a certain "memorial," containing a number of particulars, had been filed at the Stamp Office.

Banking companies of more than six persons, which had commenced but not completed proceedings for formation before May 6th, 1844, were allowed to go on for a year from the passing of the Act, but not longer (except for the purpose of closing the business) unless they obtained incorporation under the Act. The Act also afforded facilities for banking companies of more than six persons, established before May 6th, 1844, to obtain incorporation under the Act, and gave them (when carrying on business within sixty-five miles of London), even when unincorporated, and on certain conditions being complied with, the power of suing and being sued by a public officer.[62]

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[62] This article will be concluded in the June issue.